

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



ORIGINAL

75-7026

To be argued by  
ALLEN G. SWAN

**United States Court of Appeals**  
For the Second Circuit

WILLIAM STEINMAN,  
*Plaintiff-Appellant,*  
against

MAURICE H. NADJARI, individually and as Special  
Deputy Attorney General of the State of New York,  
*Defendant-Appellee.*

On Appeal from the United States District Court  
for the Eastern District of New York

**BRIEF FOR APPELLEE**

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## TABLE OF CONTENTS

	PAGE
Preliminary Statement .....	1
Questions Presented .....	2
Statement of Facts .....	2
The investigation, arrest and indictment of William Steinman .....	2
The proceedings in the Appellate Division .....	4
The instant action for injunctive and declaratory relief .....	5
Argument	
Point I—The district court's order denying appel- lant's application to convene a three-judge court was correct, since appellant's complaint did not allege the unconstitutionality of a state statute; moreover, the constitutional challenges belatedly raised after the filing of the complaint are not substantial .....	9
Point II—The district court properly dismissed the complaint because appellant's claims could be raised in a pending state prosecution and ap- pellant made no showing of great and immedi- ate injury .....	19
Conclusion .....	32
Addendum	
Statutes involved .....	33

# TABLE OF AUTHORITIES

PAGE

## Cases:

Abele v. Markie, 452 F.2d 1121 (2d Cir. 1971)	11, 18
Allee v. Medrano, 416 U.S. 802 (1974)	20
Astro Cinema Corp. Inc. v. Mackell, 422 F.2d 293 (2d Cir. 1970)	11
Bailey v. Patterson, 369 U.S. 31 (1962)	30
Baxstrom v. Herold, 383 U.S. 107 (1966)	17
Blouin v. Dembitz, 489 F.2d 488 (2d Cir. 1973)	18
Boyle v. Landry, 401 U.S. 77 (1971)	20
Bransford, Ex parte, 310 U.S. 354 (1940)	10
Byrne v. Karalexis, 401 U.S. 216 (1971)	20
Cameron v. Johnson, 390 U.S. 611 (1968)	21, 24
Canal Theatres, Inc. v. Murphy, 473 F.2d 4 (2d Cir. 1973)	22
Citizens for a Better Environment, Inc. v. Nassau County, 488 F.2d 1353 (2d Cir. 1973)	24, 27
Coleman v. Alabama, 399 U.S. 1 (1970)	31
DeSalvo v. Codd, — F. Supp. — (S.D.N.Y. Dec. 23, 1974) (3-judge court)	18
Dombrowski v. Pfister, 380 U.S. 479 (1965)	21, 23, 24, 25
Douglas v. City of Jeannette, 319 U.S. 157 (1943)	24, 25
Dreyer v. Illinois, 187 U.S. 71 (1902)	13
Dyson v. Stein, 401 U.S. 200 (1971)	20
Fenner v. Boykin, 271 U.S. 240 (1926)	21
Gajon Bar and Grill v. Kelly, — F.2d — (2d Cir. Dec. 4, 1974)	20
Galvan v. Levine, 490 F.2d 1255 (2d Cir. 1973), <i>cert. denied</i> , 417 U.S. 936 (1974)	10
Gerstein v. Pugh, — U.S. — (Feb. 18, 1975)	31

	PAGE
Green v. Board of Elections of the City of New York, 380 F.2d 445 (2d Cir. 1967), <i>cert. denied</i> , 389 U.S. 1048 (1968)	11
Griffin v. People of the State of Illinois, 351 U.S. 12 (1956)	17
Helfant v. Kugler, 500 F.2d 1188 (3d Cir. 1974), <i>cert.</i> <i>granted</i> , — U.S. — (Nov. 8, 1974)	28, 29, 30
Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962)	10
Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12 (2d Cir. 1971)	20, 23
Klein, Matter of, v. Murtagh, 44 A.D.2d 465 (2d Dept. 1974), <i>aff'd</i> , 34 N.Y.2d 988 (1974)	5, 26
Leslie v. Matzkin, 450 F.2d 310 (2d Cir. 1971), <i>cert.</i> <i>denied</i> , 406 U.S. 932 (1972)	22
Lewis v. Kugler, 446 F.2d 1343 (3d Cir. 1971)	20
Mallory v. United States, 354 U.S. 449 (1957)	30
McNabb v. United States, 318 U.S. 332 (1943)	31
Murchison, In re, 394 U.S. 133 (1955)	15, 22
Nigrone, Matter of, v. Murtagh, 46 A.D.2d 343 (2d Dept. 1974), <i>appeal pending</i>	26, 27
Offutt v. United States, 348 U.S. 11 (1954)	15
O'Shea v. Littleton, 414 U.S. 488 (1974)	22
People v. Bell, 45 A.D.2d 362 (1st Dept. 1974), <i>leave to</i> <i>appeal from resettled order granted</i> , McGIVERN, J. (Oct. 8, 1974), <i>motion to dismiss appeal denied</i> , 35 N.Y.2d 852 (1974)	16
People v. Davis, 67 Misc.2d 14 (Sup. Ct., Extraordi- nary Special and Trial Term, Ontario Co. 1971)	13, 15

	PAGE
People v. Harding, 44 A.D.2d 800 (1st Dept. 1974)	16
People v. Steinman, 44 A.D.2d 839 (2d Dept. 1974)	5, 17, 21, 26, 27
Perez v. Ledesma, 401 U.S. 87 (1971)	20, 24, 27
Phillips v. United States, 312 U.S. 246 (1941)	10, 16
Reed v. Littleton, 275 N.Y. 150 (1937)	23
Reilly v. Doyle, 483 F.2d 123 (2d Cir. 1973)	19, 20, 21, 31
Reynolds, Matter of, v. Cropsey, 241 N.Y. 389 (1925)	14
Rochin v. California, 342 U.S. 165 (1952)	26
Salem Inn v. Frank, 501 F.2d 18 (2d Cir. 1974)	20, 31
Samuels v. Mackell, 401 U.S. 66 (1971)	18, 20, 29
Saranac Land & Timber Co. v. Supreme Court, 220 N.Y. 487 (1917)	14
Shaw v. Garrison, 467 F.2d 113 (5th Cir. 1972), <i>cert. denied</i> , 409 U.S. 1024 (1972)	24
Sherman v. United States, 356 U.S. 369 (1958)	25
Sorrells v. United States, 287 U.S. 435 (1932)	25
Stefanelli v. Minard, 342 U.S. 117 (1951)	20
Steffel v. Thompson, 415 U.S. 452 (1974)	20
Steinman v. Nadjari, Index No. 18269-74 (Sup. Ct., Kings Co. 1974), <i>appeal dismissed</i> , — N.Y.2d — (Feb. 14, 1975)	23
Thoms v. Heffernan, 473 F.2d 478 (2d Cir. 1973)	22
Tumey v. State of Ohio, 273 U.S. 510 (1927)	15
United States v. Archer, 486 F.2d 670 (2d Cir. 1973)	6, 25, 26, 30
United States v. Brown, 381 U.S. 437 (1965)	13
United States v. Russell, 411 U.S. 423 (1973)	25, 26, 30
United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974)	26
United States v. Tropicano, 418 F.2d 1069 (2d Cir. 1969), <i>cert. denied</i> , 397 U.S. 1021 (1970)	22

	PAGE
Utica Mutual Insurance Company v. Vincent, 375 F.2d 129 (2d Cir. 1967) .....	11
Watson v. Buck, 313 U.S. 387 (1941) .....	22, 24, 27
Williams v. Oklahoma City, 395 U.S. 458 (1969) .....	17
Younger v. Harris, 401 U.S. 37 (1971) .....	18, 20, 21, 24, 27
Zwickler v. Koota, 389 U.S. 241 (1967) .....	18
<b><i>Constitutions, Statutes, Orders:</i></b>	
Executive Orders of the Governor of New York:	
Number 55, 9 NYCRR 1.55 .....	6, 8, 9
*Number 58, 9 NYCRR 1.58 .....	9, 19, 35-39
Number 64, 9 NYCRR 1.64 .....	12
New York Civil Practice Law and Rules (McKinney 1963):	
5601(b) .....	23
5701 .....	23
New York Constitution (McKinney 1969):	
Article IV, section 3 .....	16
Article VI, section 6(c) .....	14
*Article VI, section 27 .....	8, 11, 12, 15, 18, 19, 33
Article XIX, section 1 .....	13
New York Criminal Procedure Law (McKinney 1971):	
Section 140.20 .....	30
Section 180.60 .....	30
Section 180.70 .....	30
Section 210.20 .....	21
Section 210.45 .....	17, 21
Section 440.10 .....	22
New York Executive Law (McKinney 1972):	
*Section 63 .....	6, 7, 8, 9, 15, 19, 34-35

---

\* Reprinted in the addendum to this brief.

	PAGE
New York Judiciary Law (McKinney 1968):	
*Section 149	4, 6, 7, 8, 11, 12, 16, 18, 19, 33-34
New York Penal Law (McKinney 1967):	
Section 40.05	22, 30
Section 105.05	3
Section 110.00	3
Section 155.35	3
Section 200.00	3
United States Constitution:	
Article IV, section 4	13
Fifth Amendment	6
Fourteenth Amendment	6, 13
United States Statutes:	
28 U.S.C. §1343	5
28 U.S.C. §2281	2, 10
28 U.S.C. §2284	10
42 U.S.C. §1983	5
Fed. R. Civ. P. 12(b)(6)	19
Fed. R. Civ. P. 15	11
Fed. R. Civ. P. 56	19
Fed. R. Crim. P. 5	31
Fed. R. Crim. P. 5.1	31

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# United States Court of Appeals

For the Second Circuit

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**Docket No. 75-7026**

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WILLIAM STEINMAN,  
*Plaintiff-Appellant,*  
*against*

MAURICE H. NADJARI, individually and as Special Deputy  
Attorney General of the State of New York,  
*Defendant-Appellee.*

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**On Appeal from the United States District Court  
for the Eastern District of New York**

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## **BRIEF FOR APPELLEE**

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### **Preliminary Statement**

William Steinman appeals from a judgment of the United States District Court for the Eastern District of New York (MARK A. CONSTANTINO, J.), entered December 12, 1974, dismissing his action for declaratory and injunctive relief to stay a criminal prosecution against him in the Extraordinary Special and Trial Term of the New York Supreme Court, Kings County. Steinman further appeals from an order of said district court, entered August 8,

1974, denying his request for the convening of a three-judge court pursuant to Title 28, United States Code, Section 2281.

### **Questions Presented**

1. Is a party entitled to have his action for injunction and declaratory judgment heard by a three-judge district court when he has not specifically challenged the constitutionality of a state statute in his complaint?

2. Is a defendant in a pending state criminal proceeding entitled to enjoin his prosecution on the grounds of alleged prosecutorial misconduct when those same issues may be raised in his state trial and the state appellate courts?

### **Statement of Facts**

#### **The investigation, arrest and indictment of William Steinman\***

In the early part of 1973, members of the Office of the United States Attorney for the Southern District of New York learned from Nicholas DiStefano, a federal informant, that William Steinman, Administrative Assistant to the Comptroller for the State of New York, had agreed to receive money to illegally influence the actions of public agencies and officials (49).\*\* The United States Attorney

\* Many of the facts in this case, including the circumstances of the arrest and indeed the guilt or innocence of Steinman, are subject to dispute, and have yet to be resolved at evidentiary hearings at the state level.

\*\* Parenthetical references, unless otherwise indicated, are to appellant's appendix.

began an investigation of Steinman with the cooperation of the New York City Police Department (49). Pursuant to this investigation, the prosecutors caused Virginia Morgan, a federal agent, to be arrested in Kings County for the crime of possession of a weapon (42). Thereafter, from February 20, 1973, until September, 1973, DiStefano, working as an undercover agent, met with Steinman several times concerning disposition of the Morgan case (49-50).

In August, 1973, the United States Attorney determined that the investigation fell within the jurisdiction of state law enforcement agencies, and transferred it to the office of appellee, Maurice H. Nadjari, the Special State Prosecutor (50). The investigation then continued, partly with the use of court-ordered wiretaps (50-51). Finally, on September 25, 1973, Steinman was discovered near the Kings County Supreme Courthouse with \$5,000 in cash in his pocket (51). According to the affidavit of Special Assistant Attorney General Mark Federman, Steinman at first agreed to furnish the prosecutors with information on corruption within the New York City criminal justice system; in December, 1973, he refused to cooperate further (51-52).

By an indictment filed December 18, 1973 (52), the Extraordinary and Special Grand Jury for the County of Kings charged Steinman with the crimes of conspiracy in the third degree [N. Y. Penal Law §105.05 (McKinney 1967)], attempted bribery in the second degree [N. Y. Penal Law §§110.00, 200.00 (McKinney 1967)] and grand larceny in the second degree [N. Y. Penal Law §155.55 (McKinney 1967)]. Indictment No. S.P.O. K-6/1973 (42-44). Specif-

ically, the indictment alleged that, after Virginia Morgan had been arrested, Steinman had conspired with others to receive \$10,000, some of which would be paid as bribes to members of the criminal justice system and to two political district leaders to influence the outcome of the Morgan case (42). Pursuant to this conspiracy, the indictment alleged, Steinman engaged in a series of overt acts, in which he had discussed the Morgan case with an unidentified individual (February 20, 1973), stated that he would contact a public official in the criminal justice system, who would affect the Morgan case (May 21, 1973), obtained a list of officials in the criminal justice system in Kings County (May 21) and displayed such a list to another person (May 29), spoke to a public official in the criminal justice system concerning the Morgan case (July 3), received \$1,000 in cash at a restaurant (August 13), stated that he had met and conferred with a second public official (August 14), discussed the Morgan case with a third official (August 16), stated that he had spoken to two political district leaders concerning the case (September 6), and received \$5,000 in cash near the Kings County Supreme Courthouse (September 20) (43).

#### **The proceedings in the Appellate Division**

By permission granted January 25, 1974, pursuant to section 149, subdivision 2, of the New York Judiciary Law, Steinman moved in the Appellate Division of the New York Supreme Court, Second Department, for an order dismissing the indictment in the interest of justice, dismissing the indictment on the ground that the Special Prosecutor had abused his statutory power and authority, disqualifying the justice of the Extraordinary Special and Trial Term

of the Supreme Court from presiding at his trial, superseding and disqualifying the Special Prosecutor from prosecuting his case, granting discovery, and impounding tape recordings of intercepted conversations (26-28). On the issue of prosecutorial misconduct and abuse of power, Steinman alleged that the Special Prosecutor had entrapped him by use of a "manufactured" crime (29-33), that he had released to the press portions of the prosecutor's brief and affidavit in the Appellate Division in apparent violation of an order of that court that the papers before it be sealed (35-36), and that a member of the prosecutor's staff, during oral argument, had misrepresented to the Appellate Division that former Chief Judge FULD had sanctioned the use of "mock arrests," when in fact the judge had not done so (36-37).

The Appellate Division granted partial discovery and denied the rest of the motion, citing the concurring opinion of Mr. Justice SHAPIRO in *Matter of Klein v. Murtagh*, 44 A.D. 2d 465 (2d Dept. 1974), *aff'd*, 34 N.Y. 2d 988 (1974), that questions of prosecutorial misconduct should be decided at the trial level. *People v. Steinman*, 44 A.D. 2d 839 (2d Dept. 1974). Steinman has since made a motion in the trial court to dismiss the indictment on, for the most part, the same grounds of prosecutorial misconduct. That motion is still pending.

#### **The instant action for injunctive and declaratory relief**

After denial of the motion by the Appellate Division and referral of the matter to the trial court, Steinman brought in the court below a civil rights action, pursuant to Title 28, United States Code, Section 1343,\* on essentially

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\* Title 42, United States Code, Section 1983, which creates the cause of action, was not cited in the complaint.

the same grounds raised in the Appellate Division and requested declaratory judgment, a permanent injunction and the convening of a three-judge court to dismiss his "indictment as null and void under the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution" (2-9). Through a series of affidavits submitted by Steinman and his counsel, Steinman made allegations of entrapment, specifically that the Special Prosecutor had engaged in a "mock arrest" (13-15, 29-33, 56-57, 73-78) and that the Special Prosecutor and the United States Attorney for the Southern District of New York had attempted to coerce him into entrapping other public officials (15-19, 58, 62-67). Steinman further alleged that between his arrest and indictment he had been denied a preliminary hearing as required by state law (58), that the Special Prosecutor had improperly released to the press portions of papers which the prosecution had submitted in the Appellate Division (35-36, 58), and that Chief Special Assistant Attorney General Joseph A. Phillips had misrepresented former Chief Judge FULD's approval of the arrest procedure both in the instant case in the Appellate Division and as *amicus curiae* in this Court in *United States v. Archer*, 486 F.2d 670 (2d Cir. 1973) (36-37, 58-60, 78-79, 80-83). Steinman also claimed that the Special Prosecutor had abused his authority under section 63 of the New York Executive Law and the Governor's Executive Order Number 55, and that therefore those provisions were unconstitutional as applied (31-32, 55-56). Finally, he asserted that the Special Prosecutor and the trial judge should be disqualified pursuant to section 63 of the New York Executive Law and section 149 of the New York Judiciary Law respectively (33-35). He submitted that he was irreparably injured because the trial

judge could not be impartial in light of his "official association" with the Special Prosecutor (37-38).

The Special Prosecutor moved to dismiss the complaint for failure to state a claim on which relief could be granted (45). In a series of affidavits submitted by Chief Special Assistant Attorney General Joseph A. Phillips, Special Assistant Attorney General Mark I. Federman and Assistant United States Attorney Rudolph W. Giuliani, the Special Prosecutor argued that Steinman had not been entrapped (46-48, 51-52, 68-72), but that, in any event, the questions of prosecutorial misconduct should be resolved in the pending state prosecution, which had been brought in good faith (53-54, 68). Mr. Phillips further stated that the information he had supplied to the Appellate Division on oral argument, to the effect that Judge FULD had approved the investigative technique in a discussion with the United States Attorney, was an inadvertent error and that he had corrected the error by submitting a letter to that court (54, 71).

On June 27, 1974, in an oral argument before the United States District Court for the Eastern District of New York (CONSTANTINO, J.), Steinman, through counsel, contended that a three-judge panel should be convened because the Special Prosecutor, in light of his alleged misconduct, had exceeded his authority under section 63 of the New York Executive Law and under the Governor's executive order. Minutes of oral argument, pp. 4-6. Counsel also noted that, "although it's not in my brief," section 149 of the New York Judiciary Law, which provides that the Governor may appoint a Supreme Court justice to preside at an extraordinary special and trial term, is unconstitutional be-

cause it violates the "separation of powers provided for by our governmental scheme." *Id.* at 12-13. By a memorandum and order dated August 8, 1974, Judge CONSTANTINO denied the application for a three-judge court on the ground that the constitutionality of the provisions cited in the complaint, to wit, section 63 of the New York Executive Law and Executive Order Number 55, had not been challenged. The court invited further briefs on the Special Prosecutor's outstanding motion to dismiss the complaint, to be thereafter treated as a motion for summary judgment (86-92).

Both sides submitted further memoranda of law on the motion. Steinman, through counsel, submitted an additional affidavit challenging the constitutionality of article VI, section 27, of the New York State Constitution and its implementing statute, section 149 of the New York Judiciary Law (94-95). He asserted that the state prosecution subjected him to irreparable injury because he was "without financial resources" to defend his case (96).

By a memorandum and order dated December 6, 1974 (97-105), and an amended memorandum and order dated December 10, 1974 (107), Judge CONSTANTINO granted the Special Prosecutor's motion to dismiss the complaint on the ground that the questions presented in the action could be resolved in the state proceeding. On December 12, 1974, judgment was entered dismissing the complaint (106).

On appeal, Steinman argues that the district court's failure to convene a three-judge court and its subsequent dismissal of the complaint were erroneous.

## ARGUMENT

### POINT I

**The district court's order denying appellant's application to convene a three-judge court was correct, since appellant's complaint did not allege the unconstitutionality of a state statute; moreover, the constitutional challenges belatedly raised after the filing of the complaint are not substantial [answering appellant's brief, Points II, pp. 45-62, III].**

In his complaint for declaratory and injunctive relief, Steinman alleged that the Special State Prosecutor had abused his authority under Executive Order Number 55\* (3, 7), by which, pursuant to section 63, subdivision 2, of the New York Executive Law, the Governor of New York ordered the Attorney General to supersede the district attorneys in New York City and to prosecute acts of corruption in the criminal justice system. In a reply affidavit, counsel for Steinman argued that the state statute, authorizing the Governor to order the Attorney General to supersede a district attorney [N.Y. Executive Law §63(2) (McKinney 1972)], had been unconstitutionally applied (55-56). It is clear, however, from all the papers submitted that the alleged unconstitutional application of this statute was founded upon prosecutorial misconduct or, in other words, on the ground that the Special Prosecutor had

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\* A separate order was issued for each county in New York City. Executive Order Number 55 applies only to New York County. 9 NYCRR 1.55. The correct order in issue here, as reflected in appellant's brief, is Number 58, which, while identical to Number 55, is directed to Kings County. 9 NYCRR 1.58. Both the order and its statutory authorization [N.Y. Executive Law §63(2) (McKinney 1972)] are reprinted in the addendum to this brief.

abused his authority under the statute. The district court denied the application because no statute had been challenged (86-92). The court was correct.

A three-judge district court may be convened only to determine the constitutionality of a state statute. 28 U.S.C. §§2281, 2284. In passing upon an application for a three-judge court, a district court judge must determine "whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute." *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962). In the complaint in the instant case, no statute was even remotely challenged (2-9). Rather, Steinman claimed that the Special Prosecutor had entrapped him and had engaged in other acts of misconduct violative of due process. In regard to this claim,

"an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification." *Phillips v. United States*, 312 U.S. 246, 252 (1941).

See *Ex parte Bransford*, 310 U.S. 354 (1940); *Galvan v. Levine*, 490 F. 2d 1255 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974).

Indeed, if Steinman's claim of misconduct were to be an attack upon the constitutionality of section 63 of the Executive Law, his position would be untenable. It would amount to saying that a statute is unconstitutional because the statute itself has been violated, an absurd proposition.

Denial of a three-judge court was therefore proper because the case did not come within the requirements of the three-judge statute.

Steinman, however, claimed on oral argument in the court below (minutes of oral argument, pp. 12-13), again, more explicitly, in an affidavit submitted after the denial of his application for a three-judge court (94-96), and once again on appeal, that two other state provisions are unconstitutional, namely, article VI, section 27, of the New York State Constitution and section 149, subdivision 1, of the New York Judiciary Law.\* Suffice it to say that this new question was not contained in the complaint and was not properly before the court below. *Cf. Abele v. Markle*, 452 F. 2d 1121 (2d Cir. 1971). Nor was any effort made to amend the pleadings to reflect this question. *Cf. Fed. R. Civ. Proc. 15*. While Steinman could perhaps now be permitted to present this issue more fully in the court below, such additional litigation would be wasteful and unnecessary, since this Court, on its own, may conclude that there is no substantial constitutional question to require a hearing by a three-judge court. *Abele v. Markle*, *supra* at 1126; *Astro Cinema Corp. Inc. v. Mackell*, 422 F. 2d 293, 297-98 (2d Cir. 1970); *Green v. Board of Elections of the City of New York*, 380 F. 2d 445 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968); see *Utica Mutual Insurance Company v. Vincent*, 375 F.2d 129, 131, n. 1 (2d Cir. 1967). Steinman's claim will thus be briefly discussed on its merits.

The claim not only lacks a substantial constitutional question, but is, in fact, frivolous. Steinman's attack is

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\* Reprinted in the addendum to this brief.

directed at article VI, section 27, of the New York State Constitution and its implementing statute, section 149, subdivision 1, of the New York Judiciary Law, both of which provide that the Governor may, when "the public interest requires," appoint one or more extraordinary special and trial terms of the Supreme Court and may name "the justice who shall hold the term"; further, the Governor "may terminate the assignment of the justice and may name another justice in his place to hold the term." N.Y. CONST. art. VI, §27 (McKinney 1969); N.Y. Judiciary Law §149 (1) (McKinney 1968). By this procedure, the Governor, as he did at the same time in the other four counties of New York City, established the Extraordinary Special and Trial Term of the Supreme Court, Kings County, for the trial of cases brought by the Special Prosecutor, and named Mr. Justice JOHN M. MURTAGH to preside at the term. Exec. Order No. 64, 9 NYCRR 1.64. Steinman claims that this procedure allows the Governor to appoint and remove a judge at will and thus violates the separation of powers doctrine of the United States Constitution and the independence of the judiciary. He is wrong.

To begin with, the United States Constitution contains no requirement that the structure of state governments conform exactly to the structure of the national government. The federal separation of powers doctrine does not apply to the states:

"Whether the legislative, executive and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in some respects to some matters, exert powers which, strictly speaking,

pertain to another department of government, is *for the determination of the state*. And its determination one way or the other cannot be an element in the inquiry, whether the due process of law prescribed by the 14th Amendment has been respected by the state or its representatives when dealing with matters involving life or liberty." *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902) (emphasis supplied).

*Cf. United States v. Brown*, 381 U.S. 437, 442-43 (1965). In fact, all that the Constitution requires of each state is a "Republican Form of Government" [U.S. CONST. art. IV, §4], the existence of which here is demonstrated by the fact that the People of the State of New York themselves voted to adopt the very state constitutional provision under attack. See N.Y. CONST. art. XIX, §1 (McKinney 1969).

Even if we read Steinman's claim to be that the Governor's power constitutes an encroachment upon the judiciary, thereby resulting in the possible denial of an impartial trial, his claim is unfounded. He has in no way shown or even hinted that the Governor who appointed this Extraordinary Term or the many governors who in the past have established similar terms have done so with any purpose other than that prescribed by the statute, *i.e.*, when the public interest requires such action. Indeed, in rejecting the identical claim made by the defendants in *People v. Davis*, 67 Misc. 2d 14, 16 (Sup. Ct., Extraordinary Special and Trial Term, Ontario Co. 1971), the court wrote:

"If we were to accept the contention of the defendants that they are deprived of due process of law merely because there exists a possibility that someday, sometime a governor may appoint a judge to do his bidding *in violation of law*, then, we would logically

have to conclude that the United States Constitution which empowers the President to appoint all members of the Federal Bench is similarly a violation of due process" (emphasis supplied).

Moreover, the power vested in the Governor by the New York Constitution is far more limited than the President's, since his appointment for an extraordinary term must be from the already duly elected members of the Supreme Court bench. See N. Y. Const. art. VI, §6(c) (McKinney 1969). An extraordinary term, in turn, is "to be conducted in accordance with the rules of law governing all the other terms of court with the exception of the designation of the judge." *Matter of Reynolds v. Cropsey*, 241 N.Y. 389, 395 (1925).

Further, the additional power to terminate the assignment and name another justice to hold the term is one of necessity, occasioned by the possibility that a presently assigned justice may become unable or unwilling to continue his position. The Governor has no judicial function or influence in the proceedings. Aside from the power to assign and remove the justice, the Governor "has no power to do more," and he "has not attempted to do more." *Saranac Land and Timber Co. v. Supreme Court*, 220 N.Y. 487, 492 (1917). Indeed, he has not yet even removed or replaced the justice originally assigned to this Extraordinary Term. Ironically, the power which Steinman complains of most, the power of removing a judge, has not only not been used by the Governor, but Steinman himself attempted to have it invoked, albeit improperly, in his motion before the Appellate Division and, by inference, in the district court below (33-35). Having twice tried to use article

VI, section 27, of the New York Constitution in his favor, it is puzzling that he is now asserting its invalidity.

In this regard, it is instructive to point out that *In re Murchison*, 394 U.S. 133 (1955), relied upon by Steinman, is inapposite. There, the United States Supreme Court struck down Michigan's "one-man grand jury" system, by which a judge could conduct an investigation, charge an individual with contempt for not cooperating with that investigation and then preside at the defendant's contempt trial. This procedure, said the Supreme Court, by which one man wore four hats—complainant, indicter, prosecutor and judge—violated the basic due process right to a fair trial and an impartial court, since the trial judge had a clear vested interest in the outcome. *See Offutt v. United States*, 348 U.S. 11 (1954). Another extreme example is *Tumey v. State of Ohio*, 273 U.S. 510 (1927), in which the Supreme Court invalidated a state procedure whereby a trial judge would be paid for his service only if the defendant was convicted. Again, it was found that a judge's personal stake in the outcome violated due process of law. No such extremes are present in the provisions in question, by which the Governor has but a limited ministerial duty, exercisable only when a dire situation requires it.

Additionally, like Steinman's challenge to section 63 of the Executive Law, his claim is more correctly directed at the abuse of the Governor's authority to assign and remove a justice out of venal motives rather than at the authority itself. For the statutory and constitutional provisions challenged unequivocally require on their face that the Governor's authority must be exercised in the public interest.

This obligation is in turn consonant with the Governor's duty and oath of office to take care that the laws be faithfully executed. N. Y. CONST., art IV, §3 (McKinney 1969). An abuse of his authority over an extraordinary term would be a violation of that duty and a "violation of [the] law" challenged. *People v. Davis, supra* at 16. Steinman has not alleged such abuse by the Governor. And if he did, the allegation would not be a proper subject for a three-judge court. *Phillips v. United States, supra*. As discussed above, a state statute cannot be attacked as unconstitutional because it has been violated.

Another possible interpretation of Steinman's claim is that the trial justice appointed to the Extraordinary Term is biased. Again, such a challenge is not to a state statute and cannot, therefore, be before a three-judge court. And, in any event, Steinman has not demonstrated how the judge is biased other than to cite the judge's allegedly erroneous charges in two state cases [*People v. Bell*, 45 A.D. 2d 362 (1st Dept. 1974), *leave to appeal from resettled order granted*, McGIVERN, J. (Oct. 8, 1974), *motion to dismiss appeal denied*, 35 N.Y. 2d 852 (1974); *People v. Harding*, 44 A.D.2d 800 (1st Dept. 1974)], only one of which was tried in the Extraordinary Term [*People v. Bell, supra*], and neither of which has any bearing on the instant prosecution. Appellant's brief, pp. 53-54.

One additional claim, raised for the first time on appeal, that section 149, subdivision 2, of the Judiciary Law\* is also unconstitutional, deserves but brief comment. By that provision, the Appellate Division, in its discretion,

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\* Reprinted in the addendum to this brief.

may hear a motion addressed to an extraordinary special and trial term. Steinman argues that the provision denies him equal protection of the law because the Appellate Division may exercise its discretion in entertaining a motion. Such discretion, however, is necessary because an appellate court may not have the facilities to pass upon such a motion, especially if an evidentiary hearing is required. See N. Y. Criminal Procedure Law §210.45 (6) (McKinney 1971). This is especially true of the motion brought by Steinman in the Appellate Division, which motion involved some sharply disputed questions of fact (26-28). See *People v. Steinman*, 44 A.D.2d 839 (2d Dept. 1974). Moreover, the use of sound judicial discretion is not uncommon to either the state or federal courts, as it is employed in decisions on bail, sentence or granting certiorari or leave to appeal. Further, the same matters brought before an extraordinary term on a motion may be raised in due course on the judgment appeal in the same Appellate Division which earlier had declined to hear the motion.

Finally, there is no showing that the Appellate Division, either in Steinman's or other cases, has practiced invidious discrimination or unreasonable distinctions in deciding whether to entertain a pre-trial motion. Cf. *Williams v. Oklahoma City*, 395 U.S. 458 (1969); *Baxstrom v. Herold*, 383 U.S. 107 (1966); *Griffin v. People of the State of Illinois*, 351 U.S. 12 (1956). Steinman's claim thus lacks merit and certainly a substantial constitutional question.

Finally, it should perhaps be mentioned that, had the constitutional challenges been brought before a three-judge court, that panel would most likely have abstained from considering the state provisions, which, in their present

posture, have not yet been construed by a state appellate court. See *Blouin v. Dembitz*, 489 F.2d 488 (2d Cir. 1973); cf. *Zwickler v. Koota*, 389 U.S. 241 (1967); *De Salvo v. Codd*, — F. Supp. — (S.D.N.Y. Dec. 23, 1974) (3-judge court). The same constitutional challenges are pending in the state trial court, and presumably will be properly ruled upon in that forum, with a subsequent review by the Appellate Division and the Court of Appeals. Furthermore, as demonstrated more fully in Point II, *infra*, the pending state prosecution has been brought in good faith without great and immediate injury to appellant. See *Younger v. Harris*, 401 U.S. 37 (1971). *Samuels v. Mackell*, 401 U.S. 66 (1971). Declaratory and injunctive relief could therefore have been correctly denied by a three-judge court, if convened. *Abele v. Markle*, *supra*.\*

Accordingly, Steinman's constitutional challenges either failed to involve the validity of a state statute or lacked a substantial constitutional question. In either case, the court below properly chose not to convene a three-judge court.

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\* Steinman's declaratory judgment action in state court challenging, *inter alia*, the constitutionality of article VI, section 27, of the New York Constitution and section 149 of the New York Judiciary Law was dismissed on similar grounds. See note, p. 23, *infra*.

## POINT II

**The district court properly dismissed the complaint because appellant's claims could be raised in a pending state prosecution and appellant made no showing of great and immediate injury [answering appellant's brief, Points I, II, pp. 40-45, IV].**

Steinman brought an action in the district court for declaratory and injunctive relief to stay his state criminal proceeding on the grounds of prosecutorial misconduct, to wit, entrapment, failure to provide Steinman a preliminary hearing, releasing to the press court papers in apparent violation of a state court order, and misleading the Appellate Division on what former Chief Judge FULD said concerning the prosecution's investigative techniques (2-9). During the course of the proceeding, Steinman tangentially challenged the constitutionality of several state provisions. N.Y. CONST. art. VI, §27 (McKinney 1969); N.Y. Judiciary Law §149(1) (McKinney 1968); N.Y. Executive Law §63 (McKinney 1972); Executive Order No. 58, 9 NYCRR 1.58. After denying an initial application for the convening of a three-judge court (*see* Point I, *supra*) and receiving affidavits and memoranda of law submitted by both parties,\* the district court held that Steinman had not demonstrated the irreparable injury necessary to allow federal intervention in a pending state prosecution and dis-

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\* In its decision of December 6, 1974, the district court granted the Special Prosecutor's motion to dismiss the complaint (45) and, in so doing, assumed the truth of the facts alleged by the plaintiff (103). *See* Fed. R. Civ. P. 12(b)(6). However since the court examined papers submitted by both parties and had earlier stated that it would treat the Special Prosecutor's motion to dismiss as one for summary judgment (92), the court's decision may be viewed as having granted summary judgment in favor of the Special Prosecutor. Fed. R. Civ. P. 56; *Reilly v. Doyle*, 483 F. 2d 123, 125, n. 2 (2d Cir. 1973).

missed the complaint (97-105). Steinman argues that the court erred in its decision. An analysis of the rules prescribed for federal intervention in light of the claims advanced below reveals that the dismissal was entirely proper.

It is now well established that, with few exceptions, a federal court, as a matter of comity, should dismiss an action for declaratory and injunctive relief when the claims submitted may be raised in a pending state criminal prosecution. *Younger v. Harris*, 401 U.S. 37 (1971); *Samuels v. Mackell*, 401 U.S. 66 (1971); *Boyle v. Landry*, 401 U.S. 77 (1971); *Perez v. Ledesma*, 401 U.S. 87 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971); *Byrne v. Karallexis*, 401 U.S. 216 (1971); *Gajon Bar and Grill v. Kelly*, — F. 2d — (2d Cir. Dec. 5, 1974); cf. *Allee v. Medrano*, 416 U.S. 802 (1974); *Steffel v. Thompson*, 415 U.S. 452 (1974); *Salem Inn v. Frank*, 501 F. 2d 18 (2d Cir. 1974). This rule applies no matter whether the underlying basis for the claim is the unconstitutionality of a state statute or the misconduct of state officials. See *Stefanelli v. Minard*, 342 U.S. 117 (1951); *Reilly v. Doyle*, 483 F. 2d 123, 128 (2d Cir. 1973); *Inmates of Attica Correctional Facility v. Rockefeller*, 453 F. 2d 12, 22 (2d Cir. 1971); *Lewis v. Kugler*, 446 F. 2d 1343, 1348 (3d Cir. 1971). When a state prosecution is pending, federal intervention is only allowed when the plaintiff has shown that he faces great and immediate injury [*Younger v. Harris*, *supra* at 46], or that the prosecution has been brought in bad faith or merely to harass the plaintiff [*id.* at 49], or that other "extraordinary circumstances" exist which require intervention. *Id.* at 53-54. It is clear from the papers submitted below that Steinman demonstrated none of the exceptions to the bar against enjoining a pending state prosecution.

The "traditional prerequisite to obtaining an injunction" is a showing of irreparable injury which is "both great and immediate." *Younger v. Harris*, *supra* at 46; *Fenner v. Boykin*, 271 U.S. 240, 243-44 (1926). One aspect of such injury is the lack of an adequate remedy in the state proceedings by which the federal plaintiff may assert his claim. *Younger v. Harris*, *supra* at 48-50. While Steinman stated in his complaint and elsewhere that he had "no adequate remedy to redress the deprivation of his constitutional rights, or to prevent the irreparable injury to him" (8), he did no more than submit "a few highly conclusory allegations," hardly sufficient to support his action. *Reilly v. Doyle*, *supra* at 127. The fact remains that most of the same claims he submitted in the district court have been included in an omnibus motion to dismiss the indictment on jurisdictional grounds and in the interest of justice. See N. Y. Criminal Procedure Law §210.20 (McKinney 1971). That motion is now pending in the state trial court pursuant to the directive of the Appellate Division. See *People v. Steinman*, 44 A.D.2d 839 (2d Dept. 1974). In turn, it is "generally to be assumed that state courts and prosecutors will observe constitutional limitations" and that the "mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings." *Dombrowski v. Pfister*, 380 U.S. 479, 484-85 (1965); see *Cameron v. Johnson*, 390 U.S. 611, 621 (1968). Here, the state trial court will presumably rule correctly on the questions of law and will hold, if necessary, an evidentiary hearing to determine factual issues relevant to those portions of the motion concerning prosecutorial misconduct. See N.Y. Criminal Procedure Law §210.45(6) (McKinney 1971).

Steinman's claim, advanced in the complaint (37-39) and on appeal (appellant's brief, pp. 52-54), that the judge is inherently biased because he has been designated to sit at the Extraordinary Term by appointment of the Governor, or because he has committed alleged errors in other unrelated cases, is likewise conclusory and meritless. As explained in Point I, *supra*, there is no showing of predisposition against Steinman or an inherent interest in the outcome of the case. See *United States v. Tropicano*, 418 F. 2d 1069, 1077 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970); *cf. In re Murchison*, 394 U.S. 133 (1955).

Moreover, Steinman's allegation of prosecutorial misconduct as it relates to the affirmative defense of entrapment will be presented to and decided by the trial jury in its determination of Steinman's guilt or innocence. N. Y. Penal Law §40.05 (McKinney 1967). Further, all those issues raised in the trial court, including that of the judge's alleged bias, may be subject to full review by judgment appeal in the Appellate Division and again in the Court of Appeals, by post-conviction remedy [see N. Y. Criminal Procedure Law §440.10 (McKinney 1971)], by certiorari in the United States Supreme Court, and by habeas corpus and additional appeal in the federal courts. *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Watson v. Buck*, 313 U.S. 387, 401 (1941); *Canal Theatres, Inc. v. Murphy*, 473 F. 2d 4, 6 (2d Cir. 1973); *Leslie v. Matzkin*, 450 F. 2d 310 (2d Cir. 1971), *cert. denied*, 406 U.S. 932 (1972). In short, the "pending state prosecution at least provides him with a concrete way of resolving doubts about his constitutional rights \* \* \*." *Thoms v. Heffernan*, 473 F. 2d 478, 483 (2d Cir. 1973).

A federal plaintiff could also demonstrate great and immediate injury by showing that prosecutorial misconduct is presently continuing and thus may not be subject to attack in a pending case unrelated to the misconduct. *See, e.g., Dombrowski v. Pfister, supra* (police continued to threaten prosecution, even though vital evidence was ordered suppressed by a state court); *Inmates of Attica Correctional Facility v. Rockefeller, supra* (injunctions only allowed against continuing brutality in state prison). In the instant case, Steinman alleged no continuing misconduct. All the alleged misconduct has already occurred and is subject to challenge in the state prosecution. Again, no irreparable injury is indicated.

Finally, Steinman stated through counsel in a reply affidavit that he would face great difficulty paying the "huge expenses and legal fees involved" in defending his case and "in the taking of any appeals" from the pending prosecution and his action for declaratory judgment in the state court\* (96). It has been firmly established, however, that the "cost, anxiety, and inconvenience of having to defend

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\* During the pendency of his federal action below, Steinman brought a state action for declaratory judgment in the New York Supreme Court, Kings County, on essentially the same grounds alleged in the district court and in this Court. *Steinman v. Nadjari*, index No. 18269-1974 (Sup. Ct., Kings Co. 1974), *appeal dismissed*, — N.Y.2d — (Feb. 14, 1975). That action was dismissed on the state equitable principle, similar to the federal rule, that declaratory relief does not lie to stay a pending state criminal prosecution, absent a showing of irreparable injury. *See Reed v. Littleton*, 275 N.Y. 150, 157 (1937). The New York Court of Appeals dismissed the direct appeal from the Supreme Court because the question presented (*i.e.*, the availability of declaratory relief) did not involve solely the constitutionality of a state statute. N.Y. Civil Practice Law and Rules 5601(b) (McKinney 1963). Steinman may still appeal from the Supreme Court judgment in the Appellate Division. N. Y. Civil Practice Law and Rules 5701 (McKinney 1963).

against a single criminal prosecution" does not amount to irreparable injury. *Younger v. Harris*, *supra* at 46; see *Douglas v. City of Jeannette*, 319 U.S. 157, 164 (1943); *Watson v. Buck*, *supra* at 400. Steinman's claim was thus meaningless.

The second ground for federal intervention is a showing that the state prosecution has been brought in bad faith or to harass the party seeking relief. *Younger v. Harris*, *supra* at 49. Steinman urges, more specifically on appeal than in the court below, that the instant prosecution has been brought in bad faith, and, in this respect, he points to his allegations of prosecutorial misconduct. Bad faith or harassment prosecutions, however, have been specifically defined as those brought "without hope of obtaining a valid conviction" [*Perez v. Ledesma*, *supra* at 85] or with "no intention of pressing the charges \* \* \*, knowing that [the defendant] did not violate the [criminal] statute." *Cameron v. Johnson*, *supra* at 619-20. In other words, the prosecution must be shown to have a "sham case." *Citizens for a Better Environment, Inc. v. Nassau County*, 488 F. 2d 1353, 1360 (2d Cir. 1973). Examples of such cases include those in which the police threatened prosecution with evidence that had already been suppressed [*Dombrowski v. Pfister*, *supra*], or in which a prosecutor vainly sought a perjury indictment on a defendant's testimony in a trial where he had been acquitted of conspiracy. *Shaw v. Garrison*, 467 F. 2d 113 (5th Cir. 1972), *cert. denied*, 409 U.S. 1024 (1972). No such showing has been made of the instant state prosecution, where it is undisputed that the acts alleged in the indictment would, if proved, constitute conspiracy, attempted bribery and grand larceny.

It is necessary to point out that the tactics allegedly used by the prosecution here, specifically the United States Attorney before the case was transferred to the Special State Prosecutor for lack of federal jurisdiction—i.e., the employment of a fictitious indictment to investigate corruption in the criminal justice system—has been questioned in other cases. But, while not the case here, even a prosecution brought upon a clear constitutional infirmity does not constitute bad faith. See *Douglas v. City of Jeannette*, *supra* (no bad faith even though the prosecution was brought under a statute found unconstitutional by the United States Supreme Court). The state court is still assumed to “observe constitutional limitations.” *Dombrowski v. Pfister*, *supra* at 484-85.

Moreover, unlike the situation in *Douglas v. City of Jeannette*, *supra*, the constitutional propriety or impropriety of the prosecutorial tactics used here has not been firmly established. Thus, in its discussion on entrapment in *United States v. Archer*, 486 F. 2d 670 (2d Cir. 1973), this Court, while reversing the conviction on other grounds, strongly criticized, in dictum, the intrusion of United States Government agents into the “sanctity of the state judicial and police processes” [*id.* at 677], especially when such intrusion began “prior to the discovery of any criminal activity on the part of the defendants.” *Id.* at 675. The *Archer* case, however, left open the question of whether such investigative techniques of federal agents would constitute a defense of entrapment in federal trials [see *United States v. Russell*, 411 U.S. 423 (1973); *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932)] and certainly never discussed whether these tactics were “so outrageous that due process prin-

ciples would absolutely bar" a prosecution in state court. *United States v. Russell*, *supra* at 431; *cf. Rochin v. California*, 342 U.S. 165 (1952); *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974). Moreover, unlike in *Archer*, according to the affidavit of Special Assistant Attorney General Mark I. Federman, in support of the Special Prosecutor's motion to dismiss the complaint, the United States Attorney's Office, before beginning its investigation, had received information from a reliable informant that Steinman "had agreed to receive money to illegally and improperly influence the actions of government agencies and public officials" (49). The fact of the receipt of this information was not disputed by Steinman and will presumably be explored in more detail at the state trial level. The ensuing tactics were thereupon employed in the investigation of specific acts by a specific individual.

Further, not only have the investigative methods involved not received full discussion in this Court, but they have been explored only in a limited fashion in the state courts. Thus, when the *Archer* case was transferred to the Special State Prosecutor's Office, the Appellate Division held that the same question of prosecutorial misconduct should first be resolved at the trial level. *Matter of Klein v. Murtagh*, 44 A.D. 2d 465, 473-74 (2d Dept. 1974) (SHAPIRO, J., concurring), *aff'd*, 34 N.Y. 2d 988 (1974). That court ruled similarly in the instant case. *People v. Steinman*, *supra*. In another case, the Appellate Division, while upholding the indictment, condemned in broad dictum the Special Prosecutor's use of similar tactics and suggested that he not use them again in future investigations. *Matter of Nigrone v. Murtagh*, 46 A.D. 2d 343, 349-50 (2d Dept.

1974), *appeal pending*. As evidenced by that court's decision in *People v. Steinman, supra*, the apparent "injunction" of *Nigrone* is not applicable in the instant case, where the investigation has already been completed. Moreover, the *Nigrone* decision is presently pending in the New York Court of Appeals, where these methods will receive additional scrutiny.

Accordingly, "the conflicting affidavits before the district court hardly demonstrate the bad faith harassment necessary to enjoin a pending state criminal action." *Citizens for a Better Environment, Inc. v. Nassau County, supra* at 1360. Indeed, the alleged methods used in this case have not been held to prohibit Steinman's prosecution. The matter awaits further adjudication in the trial court, both as a ground for dismissal and as a statutory defense. It cannot be said that the prosecution has been brought "without hope of obtaining a valid conviction." *Perez v. Ledesma, supra* at 85.

The last exception to the bar to federal intervention was defined in *Younger v. Harris, supra* at 53-55, as "extraordinary circumstances," an example of which was there given in a quotation from *Watson v. Buck, supra* at 402:

"It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."

As demonstrated in Point I, *supra*, Steinman never challenged the constitutionality of a statute in his complaint, and, even if he did so later in the proceeding, those statutes now enumerated hardly amount to a constitutional infirmity

so blatant in "every clause, sentence and paragraph" as to warrant federal intervention. Nor has Steinman alleged any other improprieties which cannot receive full attention in the due course of the state prosecution.

The Third Circuit's decision in *Helfant v. Kugler*, 500 F. 2d 1188 (3d Cir. 1974), *cert. granted*, — U.S. — (Nov. 8, 1974), relied upon by appellant and distinguished by the court below (101-02), while it is inapposite, deserves some discussion. Indeed, the exception employed by the Third Circuit proves the general rule against federal intervention. Helfant, a New Jersey municipal court judge, was indicted for conspiracy, obstructing justice, aiding in the compounding of a crime, and false swearing before a grand jury. *Helfant v. Kugler*, *supra* at 1202. Immediately prior to his appearance before the grand jury, he was taken before the justices of the New Jersey Supreme Court, the state's highest court, who questioned him concerning his possible invocation of the Fifth Amendment and matters under investigation by the grand jury. In his complaint for injunction and declaratory relief in federal court, Helfant alleged that his Supreme Court appearance had so confused and bewildered him that his subsequent grand jury testimony was coerced. *Id.* at 1190-91. The Third Circuit found that the Supreme Court's involvement in the case might tend to taint the factual determination of coercion. This was so because, under New Jersey law, all court assignments, including those in the Superior Court and the Appellate Division, are made by the Supreme Court, sitting in its administrative capacity. Consequently,

"The factual determination of the 'free and unconstrained will' question within the state system will

be made by a New Jersey state judge, a state judge subject to the 'absolute and unqualified' administrative power of the Supreme Court, whose findings are presumably reviewable by an Appellate Division, assignment to which shall be by terms fixed by the rules of the Supreme Court, with a possibility of ultimate review by the New Jersey Supreme Court itself." *Id.* at 1194.

Although no bad faith was alleged, the Third Circuit majority, over a vigorous dissent, held that the involvement of the justices of the highest court in the state was an extraordinary circumstance calling for "limited federal intervention." *Id.* at 1157. Such a situation is nowhere present in the instant case, where Steinman has not alleged such an extent of judicial taint as to deny him fair treatment on all questions of fact and law. He has not made sufficient allegations against the trial judge and has made none whatsoever against the appellate courts. Moreover, in *Helfant*, the Third Circuit closely circumscribed the type of federal relief available. The court ordered only a "limited federal fact-finding" proceeding, in which the district court would be "limited to a determination of whether Helfant's testimony before the state grand jury on November 8, 1972, was the product of a free and unconstrained will" and, pursuant to the "unusual circumstances" exception of *Samuels v. Mackell*, *supra* at 73,\* would "issue a declaratory judgment setting forth its conclusions." *Helfant v. Kugler*, *supra* at 1198. With this issue having been resolved by an impartial federal tribunal, the "state will be completely free to pro-

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\* "There may be unusual circumstances in which an injunction might be withheld because, despite a plaintiff's strong claim for relief under the established standards, the injunctive remedy seemed particularly intrusive or offensive; in such a situation, a declaratory judgment might be appropriate and might not be contrary to the basic equitable doctrines governing the availability of relief." *Samuels v. Mackell*, *supra* at 73.

ceed with the state prosecution," and the New Jersey Supreme Court, on appeal, "will not be placed in an untenable situation of being a court of review as to findings of facts in which they are allegedly participants." *Id.* at 1197. Steinman, on the other hand, has not shown how even such a limited intervention would help his case or do anything other than unnecessarily disrupt the state proceeding. Indeed, as evidence of Steinman's misplaced reliance on *Hel-fant*, the Third Circuit took care to note that "the operative facts [of this case] are limited to the State of New Jersey," where the Supreme Court has both administrative and appellate powers, and that "any precedential value to our holding is miniscule." *Id.* at 1198.

Finally, it should be noted that the constitutional nature of Steinman's claims is questionable and may in fact be "nonexistent," thereby depriving him of any ground for a civil rights complaint. *See Bailey v. Patterson*, 369 U.S. 31, 33 (1962). Thus, the investigative techniques allegedly used may well involve only the "nonconstitutional" defense of entrapment. *United States v. Russell*, *supra* at 432-33; *see* N.Y. Penal Law §40.05 (McKinney 1967). And even if the defense here is a due process claim, the court below correctly perceived that *United States v. Archer*, *supra*, was "not decided in the context presented here, *i.e.*, where a federal court is asked to interfere with a pending state prosecution. Plaintiff has a forum where he can assert these due process violations" (104). Steinman's further allegation that he was not, before indictment, afforded a prompt arraignment or preliminary hearing concerns a violation, if any, of state, not constitutional, law. *See* N.Y. Criminal Procedure Law §§140.20, 180.60, 180.70 (McKinney 1971); *cf. Mallory v. United States*, 354 U.S. 449 (1957);

*McNabb v. United States*, 318 U.S. 332 (1943); Fed. R. Crim. P. 5, 5.1. Moreover, such state rights attach only upon an arrest; by Steinman's own sworn affidavit, prior to indictment he was never arrested because he was neither booked nor fingerprinted (64-65). Whatever the meaning of his statements that he was held "incommunicado," it was never asserted that, during the three months before indictment when the prosecution sought his cooperation in investigating corruption, he was incarcerated in jail or physically prevented from seeing an attorney. Cf. *Gerstein v. Pugh*, — U.S. — (Feb. 18, 1975); *Coleman v. Alabama*, 399 U.S. 1 (1970). Rather, it appears that his indictment was delayed for a determination of whether he would become an informant; throughout that time he remained at liberty, as he does now. Additionally, it is puzzling to consider what federal rights are involved in an apparent violation of a state court order to seal court papers or in an obvious misunderstanding over what the former Chief Judge said to whom. Steinman has fallen far short of indicating an enforcement of law "in an unconstitutional manner" or "discriminatory treatment" required to invoke federal jurisdiction. *Reilly v. Doyle*, *supra* at 127.

In sum, Steinman failed to make the requisite showing of great and immediate irreparable injury, bad faith harassment or other extraordinary circumstances mandated to lift the bar to federal intervention. Necessary as it was to "guard against attempts to avoid state judgment by inveighing for federal protection after initiation of the state criminal prosecution" [*Salem Inn v. Frank*, *supra* at 23], the district court's dismissal of the complaint was proper.

**Conclusion**

***The judgment should be affirmed.***

Respectfully submitted,

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March, 1975

ADDENDUM  
STATUTES INVOLVED



## ADDENDUM

### STATUTES INVOLVED

**N. Y. Constitution art. VI, §27 (McKinney 1969)**

**[Extraordinary terms of the supreme court]**

The governor may, when in his opinion the public interest requires, appoint extraordinary terms of the supreme court. He shall designate the time and place of holding the term and the justice who shall hold the term. The governor may terminate the assignment of the justice and may name another justice in his place to hold the term.

\* \* \*

**N. Y. Judiciary Law §149 (McKinney 1968)**

**Governor may appoint extraordinary terms and name justices to hold them**

1. The governor may, when, in his opinion the public interest requires, appoint one or more extraordinary special or trial terms of the supreme court. He must designate the time and place of holding the same, and name the justice who shall hold or preside at such term, and he must give notice of the appointment in such manner as, in his judgment, the public interest requires. The governor may terminate the assignment of the justice named by him to hold a term appointed pursuant to this section, and may name another justice in his place to hold the same term. In such event, the grand jury drawn to attend such term shall continue to serve thereat until discharged in the manner prescribed by law. A justice named to preside at an extraordinary term appointed under this section shall have

power to order the drawing of a grand jury or grand juries in place of or in addition to the grand jury originally drawn for such term. Such other grand jury or grand juries shall be summoned in the manner prescribed for grand juries in general and shall be subject to all the provisions of law applicable to a grand jury summoned pursuant to sections five hundred thirty-one, six hundred nine and six hundred eighty-four of this chapter.

2. A motion involving a matter pending before such extraordinary special or trial term shall be made returnable at such term, except that, in the exercise of discretion, a justice of the appellate division of the supreme court in the department in which such extraordinary special or trial term is being held may grant permission for such motion to be heard at a term of such appellate division.

\* \* \*

**N. Y. Executive Law §63 (McKinney 1972)**  
(reprinted in relevant part)

**General duties**

The attorney-general shall:

\* \* \*

2. Whenever required by the governor, attend in person, or by one of his deputies, any term of the supreme court or appear before the grand jury thereof for the purpose of managing and conducting in such court or before such jury criminal actions or proceedings or shall be specified in such requirement; in which case the attorney-general or his deputy so attending shall exercise all the powers and perform all the duties in respect of such actions or

proceedings, which the district attorney would otherwise be authorized or required to exercise or perform; and in any of such actions or proceedings the district attorney shall only exercise such powers and perform such duties as are required of him by the attorney-general or the deputy attorney-general so attending. In all such cases all expenses incurred by the attorney-general, including the salary or other compensation of all deputies employed, shall be a county charge.

\* \* \*

8. Whenever in his judgment the public interest requires it, the attorney-general may, with the approval of the governor, and when directed by the governor, shall, inquire into matters concerning the public peace, public safety and public justice. \* \* \* [For this purpose, the remainder of the subsection describes the Attorney General's powers and duties to appoint deputies, subpoena witnesses and report to the Governor.]

\* \* \*

**Executive Order No. 58, 9 NYCRR 1.58**

**[Placing requirement on Attorney General in relation to certain crimes committed by public servants in the County of Kings.]**

TO: THE HONORABLE LOUIS J. LEFKOWITZ  
ATTORNEY GENERAL OF THE STATE OF NEW YORK  
STATE CAPITOL  
ALBANY, NEW YORK

I. Pursuant to article IV section three of the Constitution of the State of New York, the provisions of subdivision two of section 63 of the Executive Law and the statutes and

law in such case made and provided, and in view of the recommendation of the Commission to Investigate Allegations of Police Corruption in the City of New York, I hereby require that you, the Attorney General of this State, attend in person, or by one or more of your assistants or deputies, an Extraordinary Special and Trial Term of the Supreme Court to be appointed by me to be held in and for the county of Kings at the County Court House and any other term or terms of the Supreme Court in and for the County of Kings, and that you, in person or by said assistants or deputies, appear before the grand jury drawn for said extraordinary term of said court, and before any grand jury or grand juries which shall be drawn or which shall have heretofore been drawn for any other term or terms of said court, for the purpose of managing and conducting in said court and before said grand jury and said other grand juries any and all proceedings, examinations and inquiries and any and all criminal actions and proceedings which may be had or taken by or before said grand jury and grand juries concerning or relating to:

(a) any and all corrupt acts and omissions by a public servant or former public servant occurring heretofore or hereafter in the County of Kings in violation of any provision of State or local law and arising out of, relating to or in any way connected with the enforcement of law or administration of criminal justice in the City of New York;

(b) any and all acts and omissions and alleged acts and omissions by any person occurring heretofore or hereafter in the County of Kings in violation of any provision of State or local law and arising out of, relating to or in any way connected with corrupt acts or omissions by a public servant or former public

servant arising out of, relating to or in any way connected with the enforcement of law or administration of criminal justice in the City of New York;

(c) any and all acts and omissions and alleged acts and omissions occurring heretofore or hereafter to obstruct, hinder or interfere with any inquiry, prosecution, trial or judgment pursuant to or connected with this requirement;

and that you conduct, manage, prosecute and handle such other proper actions and proceedings relating thereto as may come before said court and that you conduct, manage, prosecute and handle all trials at said extraordinary term of court or at any term of said court at which any and all indictments which may be found and which may hereafter be tried, pursuant to or in connection with this requirement, and in the event of any appeal or appeals or other proceedings connected therewith, to manage, prosecute, conduct and handle the same; and that in person or by your assistants or deputies you, as of the date hereof, supersede and in the place and stead of the District Attorney of the County of Kings exercise all the powers and perform all the duties conferred upon you by the statutes and law in such case made and provided and this requirement made hereunder; and that in such proceedings and actions the District Attorney of the County of Kings shall exercise only such powers and perform such duties as are required of him by you or your assistants or deputies so attending.

II. Pursuant to subdivision 8 of section 63 of the Executive Law, I also find it to be in the public interest to require that you inquire into matters concerning the public peace, public safety and public justice with respect to the subjects which are within the scope of this requirement, and I do

direct you to do so in person or by your assistant or deputies and to have the powers and duties specified in such subdivision 8 for the purposes of this requirement.

III. For purposes of this requirement the following terms have the following meanings:

(a) "Person" means a human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality.

(b) "Public servant" means (a) any public officer or employee of the state or any political subdivision thereof or of any governmental instrumentality within the state, or (b) any person exercising the functions of any such public officer or employee. The term public servant includes a person who has been elected or designated to become a public servant.

(c) "Corrupt acts and omissions" includes, but is not limited to:

(1) any act or alleged act by a public servant relating to his office but constituting an unauthorized exercise of his official functions;

(2) any failure or alleged failure by a public servant to perform a duty which is imposed upon him by State or local law or administrative rule or regulation or is clearly inherent in the nature of his office;

(3) any and all acts or omissions or alleged acts or omissions constituting a violation of the following articles of the Penal Law:

(i) Sections 135.60 and 135.65 (Coercion)

(ii) Article 155 (Larceny)

(iii) Sections 195.00 (Official Misconduct) and 195.05 (Obstructing governmental administration)

(iv) Article 200 (Bribery involving public servants and related offenses)

(v) Article 210 (Perjury and related offenses)

(vi) Article 215 (Other offenses relating to judicial and other proceedings);

(4) any and all acts or omissions or alleged acts or omissions constituting a violation of Penal Law articles 100 (Criminal Solicitation), 105 (Conspiracy), 110 (Attempt), and 115 (Criminal Facilitation) with respect to offenses defined in paragraph (3);

(5) any and all other offenses that may be properly joined with offenses defined in paragraphs (3) and (4);

IV. This requirement shall not apply to the management and conduct of the prosecution of any indictment filed in said court on or before the date of this requirement.

Signed: Nelson A. Rockefeller

Dated: September 19, 1972



Service of 2 copies of this  
within Brief is hereby  
admitted this 17th day of

March 1975

Signed [Signature]

Attorney for Plaintiff [Signature]